SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 994

P. R. MALLORY & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

P. R. Mallory & Co., Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 1, 1968.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 400 F. 2d 956. (Appendix A, *infra,* pp. 23-29.) The Decision and Order of the National Labor Relations Board is reported at 169 N. L. R. B. No. 5. (Appendix C. *infra,* pp. 33-49.)

JURISDICTION.

The decision of the court of appeals was rendered on October 7, 1968 (Appendix A, *infra*, p. 30), and its judgment was entered on November 1, 1968. (Appendix B, *infra*, pp. 31-32.) The Court has jurisdiction to review the judgment by writ of certiorari under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The court of appeals affirmed the findings of the Board that the company violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act, 29 U. S. C. §§ 158(a)(3) and 158(a)(1), by discharging an employee who was among the least active, if not the least active, of a large number of known union adherents. The questions presented are:

Whether the discharge of an employee who has engaged in some protected activity, although slight as compared to a large number of other employees, is the kind of discriminatory conduct which, if the employer fails to prove a substantial and legitimate business justification for the discharge, constitutes an unfair labor practice without proof of unlawful motivation.

Whether lawful, protected pre-election campaign statements of an employer uttered nearly a year beforehand, may be relied upon as evidence of unlawful motivation in respect to a discharge for which no business justification is proved.

Whether the court of appeals failed to consider the whole record to determine whether substantial evidence supported the findings of the Board, contrary to *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

STATUTE INVOLVED.

The case involves Sections 8(a)(1) and (3) and 8(c) of the National Labor Relations Act, as amended, 29 U. S. C. § 158(a)(1) and (3), 158(c), which are as follows:

> "Sec. 8(a) It shall be an unfair practice for an employer—
>
> "1. To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • • •
>
> "3. By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> "(c) The expressing of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit."

STATEMENT.

The Board found that Mallory Capacitor Company, a division of P. R. Mallory & Co., Inc., violated sections 8(a)(3) and 8(a)(1) of the act by discharging an employee, Darrell B. VanMeter, on January 19, 1967. It ordered reinstatement and back pay.

The Board based its finding of a violation upon three facts which it found. One was the fact that VanMeter was active on behalf of the union.[1] A second was "Respondent's union animus." (J. A. 78.)[2] The third was that the

1. International Union of Electrical, Radio and Machine Workers, AFL-CIO.

2. References to J. A. are to the pages of the Joint Appendix in the record before the court of appeals.

termination followed an instance of union activity on the part of VanMeter.

VanMeter's union activity was relatively slight. The company admitted that he was active on behalf of the union and that he wore a union button. (J. A. 77.) On the night of his termination, he asked three employees in separate conversations why they were not wearing their union buttons (J. A. 15-16) and at some point all three of them put their buttons back on. (J. A. 16-17.) The last of them, Fudge, put his button back on while VanMeter was talking to him. (J. A. 18.) There was no evidence that the company knew the subject matter of these conversations. There was evidence that after Fudge had put his button on VanMeter saw his foreman "standing over there by the desk looking at us." (J. A. 18.) VanMeter signed a union card and "gave out two or three buttons." (J. A. 77.) There was no evidence that the company knew of these activities.

These union activities were slight compared to the known union activities of a great many employees.

The company knew, by name, of over 100 employees who were vastly more prominent than VanMeter. The union had sent to the company a number of letters designating various employees as members of the union's "Voluntary Organizing Committee" (J. A. 41, 53-57, 57-64); and designating some employees "to serve on the IUE-AFL-CIO Negotiating Committee." (J. A. 58.) The union distributed a leaflet setting forth the names of candidates for election to office in the union local. (J. A. 72.) By these means, the company was informed of over 100 employees who were prominent in the union. VanMeter was not among them.

The record was plain that other employees openly passed out union literature on company property at frequent

intervals. VanMeter never did. (J. A. 31-32.) Other employees openly solicited signatures on union authorization cards in the plant on numerous occasions. (J. A. 32-35.) There was no suggestion that VanMeter ever did this. A great many employees wore union buttons. (J. A. 32-33, 35.)

Both the Board and the court of appeals found the fact of VanMeter's union activities. Neither the Board nor the court of appeals referred to the much greater union activities of many other employees, or to the fact that on the evidence VanMeter was indisputably one of the least active union adherents.

The Board did not find "union animus" from any evidence in this record. Its sole finding of union animus is contained in its statement, "In view of the Respondent's union animus . . ." and a footnote to that statement which read in full, "See *Mallory Capacitor Company*, 162 N. L. R. B. No. 126." (J. A. 78.)

The case cited was one in which the Board had found the company guilty of violating section 8(a)(1) by certain letters sent by the company to employees between January 11 and March 2, 1966, a year before VanMeter's discharge. However, fourteen days before the Board's decision in the instant case, the Board's findings and conclusions concerning the Company's "union animus" in the earlier case were set aside in *P. R. Mallory & Co., Inc.* v. *NLRB*, 389 F. 2d 704 (7th Cir. 1967). It was held by the court of appeals that the letters were lawful under section 8(c) of the act and were protected free speech. The Board did not advert to the fact that the decision upon which it relied for finding union animus had been set aside by the court of appeals.

The evidence was clear that VanMeter had threatened to quit if he did not get a raise. Although he had received

five wage increases, he was dissatisfied and aggravated because he felt his wages were low and because he received less than another employee with whom he compared himself. His termination took place at the time that the foreman told him that his latest demand for a wage increase had been denied. When he made the demand, he had told his foreman to "let me know about it, because I was planning on quitting if I didn't get it." (J. A. 20, 23, 24, 76.) VanMeter said that he was planning on giving two weeks' notice. The foreman said that that would not be necessary, that VanMeter could quit that night. (J. A. 18-19, 68, 77.)

The Board and the court of appeals rejected the company's contention that VanMeter had quit, that the company had accepted his resignation, and that the only difference between them was the time when it took effect. The Board and the court found that VanMeter had been discharged and had not quit.

The Board and the court found that the discharge was motivated by VanMeter's union activities because it followed some of those activities; because the company had not expressed to VanMeter "any feeling or objection with respect to his announced plan to quit if his raise was denied;" because the company did not permit VanMeter to complete his shift (Appendix A, p. 27); because "VanMeter had not reached a final conclusion as to quitting his job;" because "apparently he was willing to continue work for some indefinite period" (Appendix A, p. 27); and because, although the record was completely devoid of any evidence on the subject, "it may well be inferred that feelings engendered by the then recent and unresolved election were running high" (Appendix A, p. 26); and because the foreman did not testify. (Appendix A, p. 27.)

REASONS FOR GRANTING THE WRIT.

1.

The necessity of proving motive in unfair labor practice cases arising under Section 8(a)(3) of the National Labor Relations Act, as amended, is an important question of law requiring clarification by this Court in light of its recent decisions in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967) and *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375 (1967), and subsequent decisions of the Board and the courts of appeals.[3]

The Board's Decision and Order in this case, which was affirmed by the court of appeals, has the effect of holding that it may find a violation of section 8(a)(3) of the act, without proving antiunion motivation, simply by proving the discharge of a known union adherent, *unless* the employer proves a substantial and legitimate business justification for the discharge.

The established facts are very simple. Darrell VanMeter was discharged by the company on January 19, 1967. He had worn a union button and the company knew that he was active on behalf of the union. The company previously had expressed its opposition to the union in the context of a pre-election campaign prior to the first of three representation elections which was held on May 11, 1966. The company offered no "reasonable explanation" for the termination of VanMeter's employment, *i.e.*, in light of the belief that VanMeter was quitting, the company could point to no business justification for discharging him.

A second employee, Linda Faye Brown, was discharged by the company on February 23, 1967. (J. A. 81.) She

3. See Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L. J. 1269 (1968).

had worn a union button, had passed out authorization cards in the plant, had distributed union leaflets on company property and was identified to the company as a member of the union's voluntary organizing committee. (J. A. 31-34, 41, 81.) In her case, however, the company proved that she had been discharged pursuant to its published policy on absenteeism.

The Board found that VanMeter's discharge was unlawful, but that in the case of Brown's discharge, "the General Counsel has not established a *prima facie* case supporting a violation of the Act." (J. A. 83.) The evidence as to VanMeter's union activities and the company's knowledge of them, upon which the Board relied for the inference of antiunion motivation, was much less substantial than the evidence as to Brown's union activities and the company's knowledge of them. Yet in her case it was found to be insufficient to establish an unlawful purpose while the opposite result was reached as to VanMeter. The difference can only be accounted for by the fact that the company established a business justification for the one discharge (Brown's absenteeism) but none for the other.

The inconsistent result reached by the Board can be accepted only if proof of unlawful motivation was not required in the absence of proof of a business justification.

But that rule, which the Court applied in *Great Dane Trailers,* is not applicable in the ordinary discharge case. The reason is that the mere discharge of an employee, even a known union adherent, standing alone, is not the kind of conduct which inherently discourages participation in protected activity. It is not inherently the kind

of "discriminatory conduct which could have adversely affected employee rights to *some* extent." 388 U. S. at 34.[4]

In its first reported decision, *Pennyslvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1 (1935), the Board recognized that standing by themselves, discharges constitute "equivocal acts." 1 N. L. R. B. at 23.

Courts of appeals have said the same thing:

> "Rotation of personnel is a common thing. The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was the cause." *NLRB* v. *McGahey*, 233 F. 2d 406, 413 (5th Cir. 1956).

Both the Board and the courts have long recognized that the right of an employer to manage his business includes the right to hire or discharge employees for any reason, good or bad, or for no reason at all, provided only that the employer's conduct was not for the proscribed purpose of encouraging or discouraging membership in a labor organization (or participation in other forms of protected activity which have been held to be comprehended by that term). In its 1950 *Annual Report*, the Board stated:

> ". . . the Board recognizes that the act does not circumscribe the right of an employer to select, discharge, or discipline his employees, or to otherwise alter their employment status, for reasons other than those forbidden in the act. In each case, therefore, the Board scrutinizes the facts to determine whether or not the treatment of the employee involved was motivated by a desire on the part of an employer to encourage or

4. This is not to be confused with cases such as *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945), in which the purpose to discourage activity protected by the act was admittedly the reason for the discharge.

discourage union membership or other activities protected by the statute. For the Board to find a violation of this section, a preponderance of the evidence must show that the employer acted for an illegal motive. A 'strong presumption' is not enough." 15 NLRB Ann. Rep. 104 (1950).

In its 1951 *Annual Report,* the Board stated:

". . . the Act does not circumscribe an employer's right to hire, discipline, or discharge an employee for reasons not forbidden by the Act, even though the employee may be an active union advocate or adherent. . . .

" 'The employer is at all times free to discharge an employee, for any reason or for no reason, provided only that the discharge is not for the purpose of encouraging or discouraging union membership, or does not have the effect of otherwise interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.'

". . . a preponderance of the evidence [must] show an employer's illegal motive in order to show a violation of 8(a)(3), except in cases of *per se* violations such as the discharge of an employee admittedly because of activities protected by the statute." 16 NLRB Ann. Rep. 162 (1951).

The following often-quoted statement from *NLRB* v. *McGahey,* 233 F. 2d 406, 413 (5th Cir. 1956), makes the same point:

". . . management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. . . .

". . . An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a

substantial basis of believable evidence pointing toward the unlawful one. . . ."

An employer's act of discharging an employee cannot adversely affect employee rights in the way proscribed by section 8(a)(3) of the act, in the absence of a demonstrable causal connection between the employee's participation in protected activity and his discharge. Speculation will not supply the missing element. The employer is not obliged to come forward with a substantial and legitimate business reason for discharging the employee, because his rights include the right to discharge for no reason at all.

All of the cases upon which the rule applied in *Great Dane Trailers* is based involved conduct by employers which inherently tended to encourage or discourage protected activity. In *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793 (1945), the discharged employee was being punished for soliciting support for the union on company property, which was held to be protected activity. In *Radio Officers Union* v. *NLRB,* 347 U. S. 17 (1954), the employees were discharged or otherwise discriminated against at the request of the union to enforce compliance with obligations of union membership, and in the companion *Gaynor News Co.* case economic benefits were granted to union members while being denied to non-union members within the same bargaining unit. In *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221 (1963), employees were deprived of the advantages of their accrued seniority (by super seniority being granted to striker replacements and employees who abandoned the strike), because they had adhered to the strike. In *NLRB* v. *Brown,* 380 U. S. 278 (1965), the employees were locked out and temporarily replaced because their union had called a strike against one employer member of a multi-employer bargaining unit. In *American Ship Building Co.* v. *NLRB,* 380 U. S. 300 (1965), the employees were locked out because

of their adherence to their bargaining demands. Finally, in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967), the employees were denied employment because they had been on strike, *i.e.*, they were placed in the position of being deprived of their employment solely because they had been strikers.

In each of the cases referred to, the discrimination (selection of a particular employee for particular treatment) patently was related to the employees' participation or nonparticipation in protected activities. Proof of the particular conduct (discrimination), therefore, standing alone, was enough to permit the Board to infer the proscribed effect of encouraging or discouraging union membership.

But the same is not true of every act of discrimination. Thus, in *Teamsters' Local No. 357* v. *NLRB*, 365 U. S. 667 (1961), the Court, in the absence of proof of actual discrimination as between union members and non-members, refused to permit the Board to infer the proscribed effect from the enforcement of a hiring hall agreement, which resulted in discharge of the employee. This distinction was expressly adverted to in the Court's opinion in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 32 (1967).

Where the evidence establishes a discrimination which has the effect of encouraging or discouraging union membership, a *prima facie* case of violation of section 8(a)(3) has been made. The employer may avoid a finding of guilt by demonstrating that its conduct (discrimination) was in pursuance of an overriding business purpose rather than the purpose of encouraging or discouraging union membership. It is at this point that the Board's "difficult and delicate responsibility" comes into play of weighing the effect upon employee rights against the employer's business purpose and striking a balance between the con-

flicting, legitimate interests of employees and employer. *NLRB* v. *Teamsters' Local No. 449* (Buffalo Linen), 353 U. S. 87 (1957).

In the kind of case exemplified by *Great Dane Trailers* and the cases upon which it was founded the unlawful purpose or motivation is supplied by application of the principle that a person must, as a matter of law, be held to have intended the necessary and foreseeable consequences of his acts. Thus, when an employer discriminates and the necessary and foreseeable consequence of the discrimination is to encourage or discourage union membership, the employer's unlawful purpose is supplied by inference, unless the employer demonstrates that his conduct was motivated by an overriding, legitimate business purpose.

It is clear that not all discrimination necessarily and foreseeably encourages or discourages union membership. While the Board is empowered under the act to draw reasonable inferences from the facts of each case, including inferences of encouragement or discouragement of union membership, *Radio Officers Union* v. *NLRB*, 347 U. S. 17, 48-52 (1954), the inferences which the Board draws are subject to judicial review. *Teamsters' Local No. 357* v. *NLRB*, 365 U. S. 667 (1961). In the latter case the Court rejected the Board's inference that the discrimination involved in enforcing the hiring hall arrangement tended to encourage union membership. The Court made it clear that there would have to be additional evidence beside the mere existence of the hiring hall to support an inference of encouragement. See also *American Ship Building Co.*, 380 U. S. at 312.

The point can best be demonstrated by an example: An employee is discharged because his employer does not like him personally. It is a purely arbitrary act, devoid of any business justification. Even though the employer knows that the employee is a union partisan, it in fact formed no

part of his reason for the discharge. Clearly, the statute does not make that discharge unlawful. But if the rule of *Great Dane Trailers* were applied to the case, the employer, being unable to establish a substantial and legitimate business justification for its act, would be found guilty. That result would be contrary to the statute.

The petitioner has discovered no case in which this Court or a court of appeals has held that participation in protected activity followed by discharge are alone a sufficient basis to find a violation of section 8(a)(3). The law requires a greater standard of proof than *post hoc ergo propter hoc.*

The rule of *Great Dane Trailers* is not applicable in the case of a discharge, unless there is evidence that a discrimination on the basis of participation in protected activity actually was made which would support an inference by the Board of discouragement. Absent such proof, the employer's conduct can be found to have been a violation of the statute only upon proof of unlawful motivation.

The Board and at least one circuit court of appeals have recognized the inapplicability of the "special rationale" of *Great Dane Trailers* to the ordinary discharge case. *Ottaway Newspapers-Radio, Inc.*, 169 N. L. R. B. No. 156, n. 8 (1968); *NLRB* v. *Plymouth Cordage Co.*, 381 F. 2d 710, 711, n. 2 (5th Cir. 1967); but see *Cain's Coffee Co.* v. *NLRB*, ... F. 2d ....., 70 L. R. R. M. 2022 (10th Cir. 1968). It is appropriate at this time for the Court to deal with this issue of the necessity of proving unlawful purpose in discharge cases.

2.

The finding that VanMeter was discharged because of union activity and for the purpose of discouraging membership in a labor organization is not supported by sub-

stantial evidence on the record considered as a whole; and in affirming and enforcing the Board's Decision and Order, the court of appeals failed to exercise its reviewing responsibility as set forth by the Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

The failure of the court of appeals to canvass the whole record to determine the substantiality of the evidence is demonstrated in two ways. First, the court's opinion includes statements of facts which were neither found by the Board nor otherwise supported by the record. Second, the court fails to discuss or consider evidence which detracts from the Board's findings and which, had it properly been considered, would have required the Board's findings to have been rejected.

On the second page of its opinion (Appendix A, p. 24), the court stated that "the Company was strongly opposed to the Union." The Board's Decision and Order, including the Trial Examiner's Decision, contains no finding that the company was "strongly opposed" to the union. In fact, there was no finding at all, based upon evidence in the present record, as to the company's animus toward the union.

The court further states on the second page of its opinion that "the Company continued to campaign against the Union" prior to the second election. Again, there is no finding in the Board's Decision and Order that the company continued to campaign. There is no evidence at all in the record on the point. The Board's Decision and Order setting aside the second election, 167 N. L. R. B. No. 89, reveals that in fact the company had not "continued to campaign."

In describing the facts of VanMeter's termination, the court of appeals recited only part of VanMeter's testimony. That which the court recited tends to support the Board's

findings; that which the court ignored tends to detract from the findings.

The court found:

> ". . . VanMeter testified that Meador said 'he understood they turned my raise down and tonight would be a good night for you to quit. . . . I said I would give them two weeks notice when I . . . decided to quit. And he said tonight is when you quit. And I said you mean right now? An (sic) he said, right now, and then I asked him . . . you mean I don't even get to finish the week up and he said, no . . . .' " (Appendix A, pp. 25-26.)

Omitted was VanMeter's credited testimony given before the Kentucky Division of Unemployment Insurance on February 6, 1967:

> "He . . . informed me that my raise had been turned down. I said, well, I was planning on giving two weeks notice. And he said that won't be necessary, you can quit tonight." (J. A. 68.)

Inasmuch as VanMeter's version of the circumstances of his discharge which he gave before the Kentucky Division of Unemployment Insurance was not refuted, the Board's findings of fact must necessarily be based upon a synthesis of all of VanMeter's testimony. That leads to a somewhat different factual picture than drawn by the court's opinion: Van Meter had requested a wage increase; he had told his foreman that he was planning on quitting if he didn't get it; when his foreman subsequently informed him that the wage increase had been denied, he said that he was planning on giving two weeks' notice; the foreman said the notice would be unnecessary, that he could "quit tonight," and immediately terminated VanMeter's employment. Even if it is true, as the Board has found, that VanMeter had not resigned or fixed the time of his resignation, the inference of unlawful motivation which may be

drawn from the facts is less substantial in view of the fact that it was VanMeter who first injected the subject of his quitting into the conversation than it would have been had Meador actually said that his raise had been turned down and then would be a good time for him to quit.

Probably the most significant evidence ignored by the court was that which established that VanMeter was among the least active, if not the least active, of a large number of union adherents. Whatever weight the mere fact that an employee engages in union activities prior to being discharged lends to an inference that his union activities were a cause of the discharge, it disappears when the evidence establishes the fact that a great many other employees who were not discharged were more active on behalf of the union and that the employer knew of their more substantial union activities.

The union had sent the company a number of letters designating various employees as members of the union's "voluntary organizing committee." (J. A. 41, 53-57, 59-64.) In all, these letters named ninety-four employees who were claimed to be members of the organizing committee, but VanMeter was not among them. The union advised the company by letter dated June 6, 1966, that five employees had been selected "to serve on the IUE-AFL-CIO negotiating committee," but VanMeter was not a member of the negotiating committee. (J. A. 58.) On or about August 25, 1966, the union distributed a leaflet at the plant which among other information and propaganda, set forth the candidates for election to office in the union's Local No. 743. (J. A. 72.) Besides naming the union leadership, the leaflet added ten names to the list of employees whose union sympathies had already been proclaimed to the company. VanMeter was not so listed.

Other employees, including Linda Faye Brown, passed

out union literature on company property at frequent intervals, but VanMeter never did. (J. A. 31-32.) Although Brown was substantially more active and her union activities were more notorious, the Board concluded that the General Counsel had failed to make a *prima facie* case of violation of section 8(a)(3) as to her discharge on February 23, 1967.

The evidence showed that a great many employees wore union buttons in the plant. (J. A. 32-33, 35.) Indeed, six out of the seven machine operators in VanMeter's department were wearing union buttons at the time of his termination. (J. A. 12.) Wearing a union button did not make VanMeter conspicuous.

Mrs. Brown testified that she and other members of the union organizing committee solicited fellow employees to sign union authorization cards. (J. A. 32-33, 35.) She testified that she had gotten as many as eight or ten employees to sign cards, that she had asked as many as ten or twelve others who had refused to sign and that she had done this openly in the plant. (J. A. 32-35.) There was no evidence, however, that VanMeter had solicited any employee to sign a card.

The court of appeals did not advert at all to this overwhelming evidence. It did not, therefore, consider the record as a whole in determining the substantiality of the evidence supporting the Board's decision.

The court of appeals also completely ignored the fact that the record was devoid of any evidence of antiunion animus. The Board's earlier finding, of which the Trial Examiner had taken notice, that the four letters to employees, dated January 11, February 7, February 16 and March 2, 1966, which the company had sent prior to the first representation election, violated section 8(a)(1) of the act, had been set aside by the court of appeals. 389

F. 2d 704. Those letters preceded VanMeter's discharge by a year, and there is no evidence in the record of any subsequent expression of opposition by the company to the union's organizing campaign.

The court of appeals also ignored the inconsistency between the Board's finding that VanMeter's discharge was unlawful and its finding that the evidence adduced by the General Counsel was insufficient to make a *prima facie* case in connection with Brown's discharge.

In *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 487-88 (1951), the Court held:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

It is clear from the foregoing that the court of appeals failed in that duty. Its opinion considers only the evidence which justified the Board's Decision and Order and ignored completely the substantial body of evidence in the record which "fairly detracts from its weight."

3.

It is abundantly clear that the Board's findings of "union animus" and, based upon that, unlawful motive in respect to the discharge of VanMeter depended primarily upon the Board's prior finding of "antiunion animus" based upon the campaign letters in *Mallory Capacitor Co.*, 162

N. L. R. B. No. 126 (1967). When the court of appeals reversed the Board and held that the letters were lawful and protected under section 8(c) of the act, *P. R. Mallory & Co., Inc.* v. *NLRB,* 389 F. 2d 704 (7th Cir. 1967), the Board could no longer rely upon them.

Section 8(c) provides not only that the expression of any views, argument or opinion, if without threat of reprisal or force or promise of benefit, shall not constitute an unfair labor practice, but that it shall not *be evidence of* an unfair labor practice under any of the provisions of the act.

In *Linn* v. *Plant Guards Local 114,* 383 U. S. 53 (1966), the Court observed with respect to section 8(c):

> "It is more likely that Congress adopted this section for a narrower purpose [than to immunize all statements made in the course of a labor controversy], *i.e.,* to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements." 388 U. S. at 62, n. 5.

In *House Conf. Rept. No. 510,* 80th Congr., 1st Sess., 45 (1947), cited by the Court in support of the foregoing statement, it is stated:

> "Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech. . . . The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. . . ."

In *NLRB* v. *Exchange Parts Co.,* 375 U. S. 405, 409, n. 3. (1964), which involved the alleged violation of section 8(a)(1) of the act by granting economic benefits to em-

ployees shortly before a representation election, where the employer also had sent letters to employees making the point that only the company can bestow benefits, the Court nevertheless refused to rely upon "these or other words of the respondent dissociated from its conduct" in light of section 8(c) of the act.

Except for the reference to the carlier campaign letters, there is no evidence in the record of opposition by the company to the union. For all that the record shows, the company was neutral or even pro-union. Without reference to the letters, there was no basis for the Board's inference of an antiunion motive for the company's conduct. To have relied upon the lawful, protected statements to supply the missing element of proof was to do precisely what the statute prohibited.

To rely upon the company's letters to supply the missing element of motive was improper for the additional reason that those expressions were uttered prior to the beginning of the 10(b) period. The Court has held that evidence of conduct outside the 10(b) period may not be used as proof of an element of a violation within the 10(b) period nor may it be used when the evidence of conduct occurring within the 10(b) period standing alone is insufficient to establish the violation. *Machinists Local No. 1424* v. *NLRB*, 362 U. S. 411, 416-17, 422 (1960).

CONCLUSION.

For each of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 16665 September Term and Session 1968.

P. R. MALLORY & Co., INC., *Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for Review of Order of National Labor Relations Board.

October 7, 1968

Before DUFFY, *Senior Circuit Judge,* SWYGERT and KERNER, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This is a petition to review and set aside an order of the National Labor Relations Board[1] (Board) issued against Mallory Capacitor Company, a division of petitioner.

The Board found the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Darrel B. Van Meter on January 19, 1967, because of his union activities. The Board has cross-petitioned for enforcement.

The issues before us are whether the Board's findings are supported by substantial evidence on the record considered as a whole; whether the Board properly ordered the Company to reinstate Van Meter with full back pay, and whether the Board's order is too broad.

1. The Board's decision and order were dated January 9, 1968 and are reported at 169 N. L. R. B. No. 5.

In early 1966, the union[2] began an organizing campaign among the production and maintenanace employees of the Company's plant in Glasgow, Kentucky. The Company was strongly opposed to the union.

An election held May 11, 1966 was won by the union by a vote of 253 to 239 with 3 challenged votes. The Board sustained an objection to the election filed by the Company. A new election was ordered. The Company continued to campaign against the union. In the second election, the union lost. The vote was 321 to 317 with 2 void votes and 4 challenged votes.

The union filed objections to the second election and these objections were sustained by the Board. A new election was ordered. This third election was held on November 16, 1967. The union lost by a vote of 257 to 168 with 5 challenged votes. The union did not file objections. The result has been certified by the Board.

Van Meter was first employed by the Company in August 1965 for machine maintenance work at $1.35 per hour. He asked for and received a series of wage increases. In December 1965 he received an increase to $1.55 per hour; in April 1966, an increase to $1.65 per hour; in August 1966, he received a ten cent increase to $1.75 per hour, and on November 7, 1966, he received an increase to $1.85 per hour. As far as the record discloses, Van Meter's work was satisfactory to the Company.

A short time after Van Meter was first employed, the Company hired another employee to perform the same kind of work at a higher rate of pay than that of Van Meter. Furthermore, Van Meter was required to instruct the new employee in his work, and Van Meter believed he was thus being treated unfairly by the Company.

2. International Union of Electrical Radio and Machine Workers, AFL-CIO.

When he asked for a raise in 1966, Van Meter told his foreman Meador that it was "hard" to support his family, which included four children, on the wages which he was receiving. In January 1967, Van Meter again discussed a raise with his foreman Meador. He asked Meador to "let me know about it, because I was planning on quitting if I didn't get it."

On January 19, 1967, Van Meter reported for work at 4:30 p.m. He was wearing his union button. He noticed that the six machine operators in his department were not wearing their buttons although previously it had been their custom to do so.

After an hour or two of work, foreman Meador announced there was a shortage of material on which to work and that he was going to have to let the boys go home early. Van Meter asked if that meant him also, but Meador told him not necessarily unless he wanted to go home. Van Meter said he did not wish to go home and Meador said that was all right.

On that day, in the factory, Van Meter asked several of the employees why they were not wearing their union buttons. He spoke to three men all of whom put their buttons on. Just after the conversation with employee Fudge who was the third employee with whom he had spoken, Van Meter noticed that foreman Meador was observing him from a distance of from twelve to fifteen feet.

About 7 p.m., on that date and after the conversation with the three employees, Meador called Van Meter into another room of the plant. Van Meter testified it was an "isolated part of the plant." Van Meter testified that Meador said "he understood they turned my raise down and tonight would be a good night for you to quit. . . . I said I would give them two weeks notice when I . . . . decided to quit and he said tonight is when you quit and I said you

mean right now? An (sic) he said, right now, and then I asked him . . . you mean I don't even get to finish the week up and he said, no. . . ."

Petitioner insists that the Board's finding that Van Meter was discharged by the petitioner is unsupported by the record, and that the evidence shows that Van Meter volunteered to quit his employment when his latest request for a wage increase was denied.

Petitioner strongly urges that the Board's findings and conclusions concerning petitioner's "union animus" was based on a previous decision (162 N. L. R. B. No. 126), where the Board's findings as to "union animus" were set aside by this Court. *P. R. Mallory & Co., Inc.* v. *N. L. R. B.*, 389 F. 2d 704. Petitioner also urges that the claim that the Company discharged Van Meter because of his union activities is unsupported by the record.

The Board adopted the findings and conclusions of the trial examiner and found the Company discharged Van Meter because of his union activities in violation of Section 8(a)(3) and (1) of the Act. The order directs the Company to offer Van Meter immediate and full reinstatement to his job with back pay from the date of discharge to the offer of reinstatement.

Up until the last month of his employment, Van Meter was not an active participant in union activities. However, during that last month, he began to engage openly in union activities. He wore a union button. He distributed such buttons to fellow employees and urged them to wear them. His activities centered around the second election held December 29, 1966. Although in fact, the union lost that election by a narrow margin, the outcome was not known for months thereafter. It may well be inferred that feelings engendered by the then recent and unresolved election were running high. Van Meter testified that on the date of his

discharge when he asked several of his co-employees to wear their union buttons, they appeared "scared."

The Board could properly consider that neither foreman Meador nor any other representative of the Company had expressed to him any feeling or objection with reference to his announced plant to quit if his raise was denied. It could also consider that only a few minutes after the episode of Van Meter's talks with his fellow employees, resulting in their once more wearing their union buttons, that foreman Meador was telling Van Meter "tonight is when you quit," and, in effect, ushering Van Meter out of the plant without permitting him to finish the shift, sign his time card or inform the woman with whom he rode to work, of his departure.

Foreman Meador did not testify. The testimony of Van Meter as to what was said and done is undisputed. No explanation was made as to why Meador was not called as a witness. In *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F. 2d 269, 271, we pointed out that failure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it.

It seems clear from the record that Van Meter had not reached a final conclusion as to quitting his job. Apparently he was willing to continue work for some indefinite period. The Board was justified in its finding that it was the Company which was solely responsible for the termination of Van Meter's employment.

The Company's argument that it should be required only to tender two weeks' back pay is, of course, based on its claim that Van Meter quit and was not discharged. Furthermore, it is well settled that when it is determined the employer discriminatorily discharges an employee, it has the burden of proof of showing the employee would have been discharged later for purely economic reasons.

True it is, the Company did show that in the four months immediately following Van Meter's discharge, some two hundred employees were laid off, ninety-four in February and March and another one hundred and eleven in May. Nevertheless, the Board could consider that Van Meter had the highest seniority in his classification. Also, that less than one hour before his discharge, he had been told by foreman Meador that he could remain for the remainder of the shift although the other employees were being sent home for lack of materials to keep them busy.

The Company urges that the order proposed by the Board is too broad in its scope. The Board ordered the petitioner to cease and desist from discouraging membership not only in the union but also in "any other labor organization" by discriminatorily discharging any of its employees or discriminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment. In *N. L. R. B.* v. *Express Pub. Co.*, 312 U. S. 426, 437 (1941), it was stated: "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

Including other labor organizations in these circumstances is proper. *Marshfield Steel Company* v. *N. L. R. B.*, 8 Cir., 324 F. 2d 333, 339 (1963). We think also that where the employer has been found to have discharged an employee because of union activity that discriminations as to hire and fire and terms and conditions of employment bear a close resemblance to the found violation. *Alleghany Pepsi-Cola Bottling Company* v. *N. L. R. B.*, 3 Cir., 312 F. 2d 529, 532 (1963); *N. L. R. B.* v. *Mayrath Company*, 7 Cir., 319 F. 2d 424, 428 (1963).

In *P. R. Mallory & Co., Inc.* v. *N. L. R. B.*, 7 Cir., 389 F. 2d 704, 707 (1967), this Court considered an earlier phase of

this controversy. The Company had written a series of letters to its employees urging that the union be rejected, stating reasons therefor. The Labor Board held that the writing of such letters was an unfair labor practice. We disagreed, holding that the Company was protected in writing such letters under Section 8(c) of the Act.

Certainly such letters were intended to discourage membership in the union. In approving the order now before us, we do not intend in any way, to recede or back away from our holding in the *Mallory* case mentioned. Furthermore, the order before us provides that the prohibition of discouraging union membership is limited to "by discriminatorily discharging any of its employees or discriminating in any other manner in respect to their hire or tenure of employment or any term or condition of employment."

We hold that the record sustains the finding of the Board that the Company violated Section 8(a)(3) and (1) of the Act by discharging Van Meter because of his union activities.

Furthermore, that the Board properly ordered the Company to reinstate Van Meter with full back pay.

We hold further that the order of the Board is not too broad in view of the limitations hereinbefore stated as to the decision of this Court in *P. R. Mallory & Co., Inc.* v. *N. L. R. B., supra.*

The order of the Board (169 N. L. R. B. No. 5) will be

ENFORCED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, October 7, 1968

Before

HON. F. RYAN DUFFY, Senior Circuit Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. OTTO KERNER, Circuit Judge

P. R. MALLORY & Co., INC., *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for Review of an order of the National Labor Relations Board.

No. 16665

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board, the answer and request for enforcement of said order and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor Relations Board on January 9, 1968, be enforced, in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate judgment will be entered.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

P. R. MALLORY & Co., INC., *Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD, *Respondent.*
No. 16,665

JUDGMENT.

Nov. 1—1968.

Before: DUFFY, *Senior Circuit Judge,* SWYGERT and KERNER, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of P. R. Mallory & Co., Inc., to review the order of the National Labor Relations Board issued against Mallory Capacitor Company, a Division of P. R. Mallory & Co., Inc., Glasgow, Kentucky, its officers, agents, successors and assigns on January 9, 1968, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on September 19, 1968, and has considered the briefs and the transcript filed in this cause. On October 7, 1968, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

On consideration whereof, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of National Labor Relations Board in said proceedings be enforced, and that Mallory Capacitor Company, a Division of P. R. Mallory & Co., Inc., Glasgow, Kentucky, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ F. Ryan Duffy,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ Luther M. Swygert,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ Otto Kerner,
Judge, United States Court of Appeals for the Seventh Circuit.

APPENDIX C.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

* * (Caption—9-CA-4250) * *

DECISION AND ORDER.

On October 17, 1967, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the National Labor Relations Act, as amended, and recommending that Respondent cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter the General Counsel and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[1] The rulings are hereby affirmed. The

1. General Counsel contends that the Trial Examiner erred in granting Respondent's motion to strike the testimony of General Counsel's witness Frank Crain because of General Counsel's refusal to produce, under Section 102.118 of the Board's Rules and Regulations, a statement given by Crain in connection with the

Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions,[2] and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that the Respondent, Mallory Capacitor Company, A Division of P. R. Mallory & Co., Inc., Glasgow, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Decision.

Dated, Washington, D. C. January 9, 1968.

FRANK W. MCCULLOCH,
Chairman.

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,

(SEAL) *National Labor Relations Board.*

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investigation of objections to an election conducted at this plant on December 29, 1966. Crain's testimony consisted of a statement that he had participated in election campaigns in this plant, and his identification of a letter, sent to Respondent, naming employee members of the union organizing committee. Respondent stipulated that it had received this letter. As Crain's testimony would not affect the decision reached herein, we find that General Counsel was not prejudiced by the Trial Examiner's ruling. See *The Borden Company,* 157 NLRB 1100, 1101.

2. We do not agree with the Trial Examiner that the Board's finding in an earlier proceeding, that the Respondent maintained a rule prohibiting solicitation and distribution of literature during nonwork time in nonwork areas of the plant in violation of Section 8(a)(1), is *res judicata* on the issue of continued maintenance as alleged in the present proceeding. However, since there is outstanding against Respondent a Board Order to forthwith rescind the said rule, we find it unnecessary to determine this issue here. See *Fitzgerald Mills Corporation,* 139 NLRB 802, 803.

TXD—598—67
Glasgow, Ky.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Washington, D. C.

MALLORY CAPACITOR COMPANY, a Division of P. R. MALLORY & Co., INC. and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO.	Case 9-CA-4250

Sorrell Logothetis, Esq., of Cincinnati, Ohio, for the General Counsel.

Paul Rinaldi, of Jeffersontown, Ky., for the Charging Party.

Frederic D. Anderson, Esq., and Herbert C. Snyder, Jr., Esq., of Indianapolis, Ind., for the Respondent.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

Lowell Goerlich, Trial Examiner: On charges filed by International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein called the Union), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board by the Regional Director of Region 9 on June 13, 1967, issued a complaint and notice of hearing in which Mallory Capacitor Company, a Division of P. R. Mallory & Co., Inc., was named as the Respondent. It was alleged that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). The Respondent filed timely answer denying that it had engaged in or was engaging in the unfair labor practices alleged.

The case came on for hearing on August 23 and 24, 1967, at Glasgow, Kentucky. Each party was afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. A brief was filed by the Respondent.[1]

The principal question before the Trial Examiner is whether the Respondent discharge Darrel B. Van Meter and Linda Fay Brown on or about January 13, 1967, and February 23, 1967, respectively, because of their sympathies for, membership in, and activities on behalf of the

1. While at the hearing the counsel for the General Counsel stated that the "General Counsel has no desire to argue orally," but anticipated the submission of a brief, no brief from the General Counsel has been received by the Trial Examiner. The Charging Party did not file a brief.

Charging Party and for the purpose of discouraging membership in the Union.[2]

Upon the whole record, and upon his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact and Conclusions.

I. The Business of the Respondent.

Respondent is a Delaware corporation engaged in the manufacture of capacitors in its plant at Glasgow, Kentucky. During the past 12 months, which is a representative period, Respondent had a direct outflow, in interstate commerce, or products valued in excess of $50,000 which it sold and shipped directly to points outside the State of Kentucky from its Glasgow, Kentucky, plant.

The Trial Examiner finds, as is admitted by the Respondent, that at all times material herein, the Respondent

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2. It was also alleged in the complaint that the Respondent violated Section 8(a)(1) of the Act by

> promulgating, publishing, and distributing to its employees a handbook containing an unlawful non-solicitation, non-distribution rule which was and is now maintained and enforced which provides, *inter alia,* as follows:
>
> > Solicitations, collection of funds, selling among employees, pledges, subscriptions, circulation of petitions, distribution of literature, solicitation of memberships or similar activities are not allowed on company property. Special permission may be granted in certain instances of recognized charities.

In *Mallory Capacitor Company,* 162 NLRB No. 126, the Board held that the foregoing language was violative of Section 8(a)(1) of the Act and ordered the Respondent to "Forthwith rescind its existing rule against solicitation and distribution of literature as published in its employee handbook to the extent that it prohibits employees from soliciting membership in a union organization on its premises during nonworking time or from distributing union literature during nonworking time in nonworking areas."

Since it appears that the Board has considered the rule and that an appropriate remedy would not differ from the remedy already imposed by the Board, in this respect, the matter is *res adjudicata.*

was an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

The Union is now and has been at all times material herein a labor organization within the meaning of Section 2(6) and (7) of the Act.

III. The Unfair Labor Practices.

A. The Termination of Employment of Darrel B. Van Meter.

Darrel B. Van Meter was first employed in August 1965 as a maintenance and set-up man at a starting rate of $1.35 per hour. About 3 or 4 months later, another employee was hired for the same job starting at $1.75 per hour. Van Meter taught the new man the work. Van Meter was upset and aggravated by the fact that the junior employee whom he had taught was paid more for the same job. Van Meter thought if was unfair, and had made his views known to his superiors.

During the course of his employment, Van Meter asked for and obtained a series of wage increases. He had gradually narrowed the gap in wages between himself and the other maintenance and set-up man until at the time he quit he was receiving "pretty close to" the same amount as the other employee. His last wage increase which he had received prior to his termination was on November 7, 1966. This increase brought his wage to $1.85 an hour. In December 1966 Van Meter asked for an additional wage increase. Again around the first of January he asked for a wage increase from his foreman, Sam Meador. Van Meter testified:

I asked him if they turned my raise down, or accepted

> it, whichever one it was and if he would let me know about it because I was planning on quitting if I didn't get it.

Meador responded that he would find out and let him know.

The Respondent concedes that Van Meter was "active on behalf of the Union and wore a union button." He had signed a union card and "gave out two or three buttons."

When Van Meter arrived for work on January 13, 1967, employees in his department were wearing union buttons. A short time later Van Meter noticed that the employees had removed the buttons. About the same time Foreman Meador appeared and told the employees that "there was going to be a shortage and that they would have to let them go that night." Van Meter asked whether he was included in the group. Meador answered, "[N]ot necessarily," unless he wanted to leave. Van Meter said that he would stay, which was agreeable to Meador. Later in the day Van Meter asked certain of the employees, one of whom was Glenn Fudge, why they were not wearing union buttons. While Van Meter was inquiring of Fudge, Fudge replaced his union button. At the time Van Meter observed Meador "standing over there by the desk looking at [them]." Approximately a half hour later Meador called Van Meter to "an isolated part of the plant" and told him that he "understood they turned [his] raise down and tonight would be a good night for [him] to quit." Van Meter responded that he "would give them two weeks notice when [he] did and when [he] decided to quit. Van Meter described the remainder of the conversation, " . . . he said tonight is when you quit and I said you mean right now? And he said, right now, and then I asked him, I said, I asked him you mean I don't even get to finish the week up and he said no, and then he picked up the phone beside the desk and called someone and told them that that was it, and I said, I don't even have a way home, I ride with

another employee although I could call the wife and he said, well, I'll punch your card out and let you go call your wife and as I was leaving he called to me and said, I'll even go better than that, I'll put on your card that you gave two weeks notice." Van Meter proceeded to the lunchroom to telephone his wife; Meador followed. Van Meter turned to him and asked "if it would be all right" if he told the lady he rode with that he would be going home. Meador replied that he would see that she received the message.

Van Meter filed a claim for unemployment compensation with the Division of Unemployment Insurance of Kentucky which was denied.[3] Van Meter did not appeal.

A transcript taken before an unemployment insurance examiner reveals that Van Meter testified:

> I made the statement that if I didn't get my next raise that was due, I was planning on quitting, but I didn't say I was giving a date to quit.

In regard to his conversation with Meador on the day of his termination Van Meter testified before the unemployment insurance examiner:

> He taken me off to an isolated part of the plant and informed me that my raise had been turned down. I said, well, I was planing on giving two weeks notice. And he said that won't be necessary, you can quit tonight. Tha twas approximately ten minutes till seven. It was on the second shift.

The foregoing facts are drawn from Van Meter's uncontradicted and credited testimony. Meador was not called as a witness.

In view of the Respondent's union animus[4] and the lack

3. The findings were, "The claimant quit because his reque for a raise was denied. There was no violation of contract of hire. Therefore the voluntary quitting was without good cause."

4. See *Mallory Capacitor Company*, 142 NLRB No. 126.

of any reasonable explanation as to why Van Meter was abruptly sent home in the middle of a shift after he had been allowed to remain even though other employees had been "let . . . go home early" because "there was going to be a shortage" the Trial Examiner is of the opinion that Van Meter's precipitous termination of employment was motivated by union considerations and was touched off by Meador's observation of employee Fudge's putting "his button back on" during the conversation with Van Meter. Moreover, it is reasonable to conclude that Meador was well aware of the manner in which Van Meter would react if he were told that his requested wage increase had been denied and that Meador used Van Meter's anticipated reaction as a pretext for ridding the Respondent's plant "pronto" of a union partisan. To this end Meador's action in terminating the employment of Van Meter was executed in such haste that Van Meter was never actually given the chance to resign or fix the time of his resignation. The decision in this record was made only by Meador. The record as a whole, all of which the Trial Examiner has considered, clearly establishes that the "real motive"[5] for the Respondent's conduct detailed above was to discourage membership in a labor organization.

The Trial Examiner finds that by the discharge of Darrel B. Van Meter on January 13, 1967, the Respondent violated Section 8(a)(3) of the Act.

B. The Discharge of Linda Fay Brown.

On July 18, 1966, the Respondent published a policy on absenteeism. The policy provided that when an employee was absent for any reason on three occasions in 1 calendar month or on four occasions within 2 consecutive calendar

5. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Local 357, International Brotherhood of Teamsters, etc.* v. *N. L. R. B.*, 365 U. S. 667, 675.

months, he was to receive a written warning, and if within a 6-month period following the warning the employee was again absent on three occasions within 1 calendar month or four occasions within 2 consecutive calendar months, he would be discharged. The policy also provided that if an employee was absent for three consecutive days without notifying the Company, he would be released. The only exceptions to the policy were when an employee was on a paid vacation or paid holiday or granted a leave of absence for pregnancy, jury duty, or forced military service. In the application of the policy, an occasion of absence was construed as a period of continued absence and could be a day or several consecutive days of absence.

Under the policy the Respondent's foremen had no authority to excuse employee absences or waive the absenteeism policy. Jack Brenner, the plant manager, testified that the plant manager had only that authority. According to Brenner, the policy had been waived in only two cases in the past: once when the employee's absence was due to her house burning down and another when the employee had to take his daughter to Louisville for treatment of a deformed leg. Personal sickness of an employee had never been considered a ground for a waiver. Any information or recommendation concerning a particular employee's circumstances which might warrant a waiver of the absenteeism policy came to Brenner's attention through the plant superintendent, who would have access to any such information through direct-line supervision.

The foremen, who kept their own records of absenteeism, were charged with the responsibility of initiating action under the policy. If a foreman failed to issue a warning or failed to initiate the discharge of an employee who had violated the policy, chances were he would escape the consequences of his absenteeism since there was no monitoring action by the personnel department.

The absentee policy was in effect on February 23, 1967, the date of Linda Fay Brown's discharge, and Brown was familiar with the policy. Moreover, the General Counsel concedes that on the date of her discharge Brown was in violation of the policy and was subject to discharge thereunder.

Brown worked for the Respondent for about 11 months as a roller. Her foreman was Dennie Gooden. The Respondent admitted, " . . . she openly wore a button in the plant just as she testified. We knew that she was active in the union. Her name was in one of the letters we got." Brown pased out union leaflets, solicited employees and served on a "voluntary organizing committee."

On February 13, 1967, Brown and employee Clara May Puckett distributed union leaflets at the front steps of the plant after work; Plant Superintendent Garrison directed them to distribute the leaflets at the plant gate rather than on the front steps.

When Brown arrived for work on February 23, 1967, Brown, at the request of her general foreman Lloyd Dixon, accompanied Dixon to the front office where she remained seated while he went into Superintendent Garrison's office. Dixon remarked to Brown that she was being "released for absenteeism" and that he did not want to tell her that "out front" because he did not "thing it was any of their business."

Dixon reappeared with a sheet of paper on which he pointed out Brown's absences. She responded that she had a doctor's statement for the days that she was absent. He said "doctor's statements don't count." He added "I guess you know the real reason we are releasing you."

Brown said ". . . yes I guess you know I will file charges. . . ."[6] Dixon left.

Betty Williams, an employee of the personnel department, appeared and asked Brown whether she had been "told." Brown answered affirmatively and inquired about her insurance. She was informed that it would be automatically dropped and that she could get a refund on her uniforms. Information was also given to her respecting her bonds. Upon the request of Brown, Williams obtained Brown's check which she gave to her together with a warning slip.[7] Brown showed the doctor's statement[8] to Williams. The conversation ended at this point and Brown went to the lunchroom, where she called her sister-in-law to come to get her.

The "Summary of Employee Absenteeism" (July 18, 1966, to April 15, 1967) prepared by the Respondent and offered into evidence by the General Counsel discloses a number of cases in which employees should have received warnings for absenteeism but were not warned and several cases in which employees should have been discharged as violators of the policy but were not. One of these latter employees was Clara May Puckett, who was a member of the union organizing committee and was identified by Brown as the one who, with her, distributed union litera-

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6. Dixon's testimony was substantially the same as that of Brown except that Dixon denied that he said, "I guess you know the real reason I am releasing you" and "yes and I guess you know I will file charges."

7. The warning slip entitled, "Avoid Verbal Orders," dated February 22, 1967, disclosed the following language, "This warning is being given because of of [sic] your absence on two separate occasions in Jan. and Feb. Jan. 9th & 10th & 19. Feb. 6th & 22. This is your final warning. You are being released for absenteeism." The statement was signed by D. Gooden.

8. The doctor's statement from Lawrence P. Emberton, M.D., dated February 22, 1967 noted, "Linda Brown made a call to my office today."

ture on company property. Brown, according to the summary, should have received a warning in respect to three occasions of absence in August, but did not.

After all parties had rested, the Respondent moved to dismiss the complaint.[9] While, as in the case of *Mallory Capacitor Company,* 163 NLRB No. 51, the circumstances surrounding the discharge of Brown are of a suspicious nature when considered in the light of the findings made in *Mallory Capacitor Company,* 162 NLRB No. 126, nevertheless, based upon the criterion applied in 163 NLRB No. 51, the Trial Examiner is of the opinion that the General Counsel has not established a *prima facie* case supporting a violation of the Act in regard to the discharge of Brown as alleged in the complaint. The Respondent's motion to dismiss is granted in part and denied in part and the allegations in the complaint involving Brown are dismissed.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Recommended Remedy.

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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9. At the close of the General Counsel's case-in-chief the Respondent moved to dismiss "each allegation of the complaint for the reason that the evidence presented in this case does not sustain the allegations for the complaint as a whole or in part of the individual allegations of the complaint."

It having been found that the Respondent unlawfully terminated the employement of Darrel B. Van Meter, it is recommended that the Respondent, in accordance with Board policy,[10] offer Darrel B. Van Meter immediate and full reinstatement to his former or substantially equivalent position and without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to the amount he would have earned from the date of his discriminatory separation from employment to the date of an offer of reinstatment,[11] less net earnings during said period to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289, and shall include interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Conclusions of Law.

1. The Union is a labor organization within the meaning of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. By unlawfully separating Darrel B. Van Meter from employment on January 13, 1967, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor

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10. See *The Rushton Company,* 158 NLRB 1730, footnote 2.

11. Since the record is not clear as to when Van Meter would have quit, if at all, backpay is recommended for the entire backpay period.

practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that Respondent, Mallory Capacitor Company, A Division of P. R. Mallory & Co., Inc., Glasgow, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in the International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization by discriminatorily discharging any of its employees or discriminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Darrel B. Van Meter immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay which may have been incurred by reason of the Respondent's discrimination against him in accordance with the recommendations set forth in the section of this Decision entitled "The Recommended Remedy."

(b) Notify Darrel B. Van Meter if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all pay-

roll records, social security records, timecards, personnel records and reports, and all other records relevant or necessary to determination of backpay due and to the reinstatement and related rights provided under the terms of this Recommended Order.

(d) Post at its Glasgow, Kentucky, plant, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Recommended Order, what steps Respondent has taken to comply herewith.[13]

It Is Further Recommended that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

Dated at Washington D. C.

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12. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

13. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX.

Notice to All Employees.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not discourage union activity or membership in the International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization by discharging any of our employees.

We will offer Darrel B. Van Meter, whom we separated from employment, full reinstatement to his old job or a substantially equivalent job and we will pay him any loss of pay which he has suffered because we treated him in this manner.

Mallory Capacitor Company,
A Division of P. R. Mallory & Co., Inc.

(Employer)

Dated..... By.....
(Representative) (Title)

Note: We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 684-3686.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 994

P. R. MALLORY & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–29) is reported at 400 F. 2d 956. The Board's decision and order (Pet. App. 33–49) are reported at 169 NLRB No. 5.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1968 (Pet. App. 31–32). The petition for a writ of certiorari was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

336-129—69

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth on page 3 of the petition.

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company discharged an employee because of his union activities.

STATEMENT

Early in 1966, the Union (International Union of Electrical, Radio and Machine Workers, AFL–CIO) began an organizing campaign among the production and maintenance employees in the Company's plant at Glasgow, Kentucky. The Company was opposed to the Union and actively campaigned against it. See *Mallory Capacitor Company,* 162 NLRB 1404, enforced in part, 389 F. 2d 704 (C.A. 7). An election held on May 11, 1966, was won by the Union by a vote of 253 to 239, with three challenged ballots. On December 5, 1966, however, the Board sustained the Company's objection to the election and directed a second election (161 NLRB 1510). Thereafter, the Company continued to campaign against the Union. The Union lost the second election on December 29, 1966, by a vote of 332 to 317, with four challenged and two void ballots. On September 29, 1967, the Board sustained the Union's objections to that election and directed a third election (167 NLRB No. 89, 66 LRRM 1116). The discharge of employee Darrel B. Van Meter

occurred on January 19, 1967, shortly after the second election.

Van Meter began working for the Company in August 1965 as a machine maintenance worker at a starting rate of $1.35 per hour (J.A. 76; 10, 22).[1] From that time until his discharge, he received five pay increases, which raised his wages to $1.85 per hour (J.A. 76; 10, 22–23). Nothing in the record indicates that Van Meter's work was unsatisfactory or that the Company ever criticized it (J.A. 21).

Shortly after Van Meter was hired, another employee was hired to perform the same type of work at a higher rate, and Van Meter was assigned to instruct him. The raises received by Van Meter had narrowed but not eliminated the gap between his rate and that of the other employee, and consequently, Van Meter believed that he was being treated unfairly by the Company (J.A. 76; 24–25). In December 1966, Van Meter asked the Company for another raise, pointing out that it was difficult to support his family on his wages. He discussed the matter with his foreman, Meador, and with Bill Birl, another Company representative, and was told to wait a month to see what the Company could do about it (J.A. 76; 19–20, 23). In January 1967, he again discussed the question of his raise with Meador and asked Meador to "let me know about it because I was planning on quitting if I didn't get it" (J.A. 76; 20, 23–24).

In mid-December 1966, shortly before the second election, Van Meter became active on behalf of the

[1] "J.A." refers to the joint appendix in the court below.

Union. He began wearing a union button himself and passed out union buttons to other employees in his department (J.A. 77; 11–12).

On January 19, 1967, Van Meter reported for work at 4:30 p.m., wearing his union button. He noticed that the six other employees in his department were not wearing their union buttons, although all had done so previously (J.A. 77; 12–15). Van Meter testified that after an hour or two of work, Foreman Meador said there "was going to be a shortage of material and he was going to have to let the boys go home early and I asked him to tell if that meant me also and he said not necessarily unless I wanted to." When Van Meter said that he "didn't want to go home," Meador replied "that was all right" (J.A. 77; 14–15).

Van Meter then asked the other employees why they were not wearing their union buttons. He spoke to three men, all of whom put their buttons back on, although they appeared "scared". After his conversation with the third employee, Glenn Fudge, during which Fudge had put his button back on, Van Meter noticed that Foreman Meador was observing them (J.A. 77; 15–18).

About a half hour later, at 7:00 p.m., Meador called Van Meter into an "isolated part of the plant." Van Meter described their discussion as follows (J.A. 77–78; 18–19):

> He [Meador] said I asked him to tell me when my raise was due, whatever he would give me, and he told me he understood they turned my raise down and tonight would be a good night

> for you to quit. * * * He said, like I just repeated, I said I would give them two weeks notice when I did and when I decided to quit and he said tonight is when you quit and I said you mean right now? And he said, right now, and then I asked him, I said, I asked him you mean I don't even get to finish the week up and he said, no, and then he picked up the phone beside the desk and called some place and told them that that was it, and I said, I don't even have a way home, I ride with another employee although I could call the wife and he said, well, I'll punch your card out and let you go call your wife and as I was leaving he called to me and said, I'll even go better than that, I'll put on your card that you gave two weeks notice.

After Van Meter telephoned his wife, he asked Meador whether "it would be all right [to tell] the lady I rode with that I would be going home and he said that he would see that she got the message" (J.A. 78; 19) Foreman Meador was not called to testify (J.A. 78).

In view of the Company's anti-union animus and the sudden discharge of Van Meter in the middle of a shift, without any asserted justification and promptly after he was observed encouraging employee Fudge to wear his union button, the Board found that the Company discharged Van Meter because of his union activities, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 40–41, 34). The Board ordered the Company to offer Van Meter "immediate and full reinstatement" to his job, with backpay from the

date of his discharge to the offer of reinstatement (Pet. App. 46–49, 34).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 29, 31–32).

ARGUMENT

The essential question presented by the petition is whether substantial evidence on the record as a whole supports the Board's finding that petitioner discharged Van Meter because of his union activities, in violation of Section 8(a)(3) and (1) of the Act. The court of appeals, which has the principal responsibility for reviewing the sufficiency of the evidence, correctly found that the record adequately supported the Board's findings; the issue does not warrant re-examination by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

Contrary to petitioner's contention (Pet. 7), the Board's decision does not permit a finding of a violation of Section 8(a)(3) "without proving antiunion motivation," simply by showing the discharge of a known union adherent, unless the employer demonstrates "a substantial and legitimate business justification for the discharge." In determining the motive for the discharge, the Board properly considered the fact that petitioner adduced no reasonable explanation for abruptly discharging an experienced employee with a satisfactory work record, but the absence of a business justification is not the only factor which the Board

considered. It was only after reviewing all the circumstances surrounding Van Meter's discharge that the Board concluded that the "real motive" therefor was his union activity (Pet. App. 41).

The court of appeals' failure to discuss certain evidence cited in the petition does not support the contention (Pet. 14–19) that the court failed to exercise its reviewing responsibility. The court stated that the relevant issue was "whether the Board's findings are supported by substantial evidence on the record considered as a whole", and it then went on to discuss the more pertinent objections raised by the Company (Pet. App. 23–29). The fact that the court did not discuss every point offered in support of the Company's position does not refute its statement that it was considering the whole record; a reviewing court is not obliged to discuss specifically every contention raised by a party.

Finally, with respect to the Company's attitude of opposition to the Union, the Board did not err in noting an earlier proceeding which in part involved various letters sent to the employees and speeches which the Company made during the election campaigns. The court of appeals had held in that prior case [2] that an unfair labor practice finding could not be based on the contents of the Company's letters because they were privileged under Section 8(c) of the Act. But that does not mean that the Board and the court could not properly consider the fact of the Company's opposition to the Union during the stormy organiza-

[2] *P. R. Mallory & Co.* v. *National Labor Relations Board*, 389 F. 2d 704 (C.A. 7).

tional campaign—as distinguished from the specific contents of the letters themselves—as "'background' against which to measure statements, conduct, and the like made by other management spokesmen * * *." *Hendrix Manufacturing Co.* v. *National Labor Relations Board,* 321 F. 2d 100, 103–104 (C.A. 5). Accord: *United Automobile Workers* v. *National Labor Relations Board,* 363 F. 2d 702, 707 (C.A. D.C.), certiorari denied, 385 U.S. 973. Although a history of opposition to a union cannot alone support an unfair labor practice finding, it may be utilized to shed light on other probative evidence. Past events may be used for this purpose even though they occurred outside the Section 10(b) limitations period. *Local Lodge No. 1424* v. *National Labor Relations Board,* 362 U.S. 411, 416–417.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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